

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BROWNSTEIN HYATT FARBER SCHRECK
100 City Parkway, Suite 1600
Las Vegas, Nevada 89106
(702) 382-2101

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TRUSTEES OF THE CEMENT MASONS
AND PLASTERERS HEALTH AND
WELFARE TRUST; TRUSTEES OF THE
CEMENT MASONS AND PLASTERERS
JOINT PENSION TRUST; TRUSTEES OF
THE CEMENT MASONS AND
PLASTERERS VACATION SAVINGS
PLAN TRUST; and TRUSTEES OF THE
CEMENT MASONS AND PLASTERERS
JOINT APPRENTICESHIP TRAINING
TRUST,

Plaintiffs,

vs.

ARCON FLOORING, INC., a Nevada
corporation; MARK M. BALOGH, an
individual; CARL T. POSTMA, an
individual; and DEVELOPERS SURETY
AND INDEMNITY COMPANY,

Defendants.

Case No. 2:09-cv-01967-HDM-RJJ

ORDER GRANTING

**STIPULATION FOR ENTRY OF
JUDGMENT BY CONFESSION AND
PERMANENT INJUNCTION**

Plaintiffs, the Trustees of the Cement Masons and Plasterers Health and Welfare Trust, Trustees of the Cement Masons and Plasterers Joint Pension Trust, Trustees of the Cement Masons and Plasterers Vacation Savings Plan Trust and Trustees of the Cement Masons and Plasterers Joint Apprenticeship Training Trust (collectively "Trust Funds"), and the Defendants,

1 Arcon Flooring, Inc. ("Arcon"), Mark M. Balogh ("Balogh"), Carl T. Postma ("Postma") and
2 Developers Surety and Indemnity Company ("Developers") (collectively "Defendants"), hereby
3 Stipulate and Agree, as follows:

4 1. This Stipulation for Entry of Judgment by Confession ("Stipulation") is entered
5 into by and between the above-named parties to settle and conclude certain legal disputes relating
6 to fringe benefit contributions and contract damages owed to the Trust Funds by Arcon pursuant
7 to 29 U.S.C. § 1001 et seq. of the Employee Retirement Income Security Act of 1974 ("ERISA").

8 2. Arcon is signatory to and bound by the terms of a collective bargaining agreement
9 ("Labor Agreement") with the Operative Plasterers and Cement Masons International
10 Association, Local No. 797 ("Union"), in which Arcon agreed to abide by the trust agreements
11 establishing the respective Trust Funds and any amendments thereto ("Trust Agreements").

12 3. Under these Agreements, Arcon is obligated to timely remit certain contributions
13 to the Trust Funds on behalf of Arcon's bargaining unit employees represented by the Union.

14 4. Based on remittance reports prepared and submitted by Arcon for the months of
15 October 2008 through April 2010, Arcon is indebted to the Trust Funds for payment of delinquent
16 contributions and resulting ancillary costs.

17 5. Balogh and Postma (collectively the "Fiduciary Defendants") are the officers
18 and/or managing members of Arcon. As officers and/or managing members, the Fiduciary
19 Defendants have control over whether Arcon pays the contributions it owes to the Trust Funds.

20 6. The contributions become Trust Fund assets as of the date they are due to the Trust
21 Funds.

22 7. By virtue of the Fiduciary Defendants' possession and control of employee
23 benefits, the Fiduciary Defendants are each a "fiduciary" under ERISA.

24 8. As ERISA fiduciaries, the Fiduciary Defendants have a duty to make the Trust
25 Funds whole for all delinquent contributions and resulting ancillary costs that are due or may
26 become due from Arcon.

1 9. A Judgment by Confession and Permanent Injunction ("Judgment") shall be
2 entered in favor of the Trust Funds and against Defendants for the sum of Eighteen Thousand
3 Eight Hundred Seventy-Six and 40/100 Dollars (\$18,876.40), which includes known claims for
4 unpaid principal contributions, interest, attorney's fees and court costs for the months of October
5 2008 through April 2010 and is subject to the terms, conditions and payment obligations
6 contained in said Judgment.

7 10. This Stipulation is conditioned by certain and specific terms contained within the
8 Judgment executed contemporaneously herewith and incorporated herein by this reference, as
9 though fully set forth *hoc verba*.

10 Dated: July 13, 2010.

BROWNSTEIN HYATT FARBER & SCHRECK

12 /s/ Xanna Hardman

13 Xanna R. Hardman, Esq.
14 100 City Parkway, Suite 1600
15 Las Vegas, Nevada 89106
16 Off: (702) 382-2101
17 Fax: (702) 382-8135
18 *Counsel for Plaintiffs*

19 Dated: July 12, 2010.

20 ELLSWORTH MOODY & BENNION, CHTD.

21 
22 Andrew D. Smith, Esq.
23 7881 W. Charleston Boulevard, Suite 210
24 Las Vegas, Nevada 89117
25 Off: (702) 658-6100
26 Fax: (702) 658-2502
27 *Counsel for Defendants*

BROWNSTEIN HYATT FARBER SCHRECK
100 City Parkway, Suite 1600
Las Vegas, Nevada 89106
(702) 382-2101

1 Andrew S. Brignone
2 Nevada Bar No. 751
3 Xanna R. Hardman
4 Nevada Bar No. 9579
5 BROWNSTEIN HYATT FARBER SCHRECK, LLP
6 100 City Parkway, Suite 1600
7 Las Vegas, Nevada 89106
8 Off: (702) 382-2101
9 Fax: (702) 382-8135
10 Attorneys for Plaintiffs

11
12
13
14
15
16
17
18
19
20
21
22
23
1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 TRUSTEES OF THE CEMENT MASONS
4 AND PLASTERERS HEALTH AND
5 WELFARE TRUST; TRUSTEES OF THE
6 CEMENT MASONS AND PLASTERERS
7 JOINT PENSION TRUST; TRUSTEES OF
8 THE CEMENT MASONS AND
9 PLASTERERS VACATION SAVINGS
10 PLAN TRUST; and TRUSTEES OF THE
11 CEMENT MASONS AND PLASTERERS
12 JOINT APPRENTICESHIP TRAINING
13 TRUST,

14 Case No. 2:09-cv-01967-HDM-RJJ

15 Plaintiffs,

16
17 vs.
18
19 JUDGMENT BY CONFESSION AND
20 PERMANENT INJUNCTION
21

22 ARCON FLOORING, INC., a Nevada
23 corporation; MARK M. BALOGH, an
individual; CARL T. POSTMA, an
individual; and DEVELOPERS SURETY
AND INDEMNITY COMPANY,

24 Defendants.

25 Pursuant to the express Stipulation for Entry of Judgment by Confession and Permanent
26 Injunction ("Stipulation") between the parties hereto, the terms of which are incorporated herein
27 by reference, it is hereby ORDERED, ADJUDGED AND DECREED that:

28 1. Plaintiffs, the Trustees of the Cement Masons and Plasterers Health and Welfare
Trust, Trustees of the Cement Masons and Plasterers Joint Pension Trust, Trustees of the Cement

BROWNSTEIN HYATT FARBER SCHRECK
100 City Parkway, Suite 1600
Las Vegas, Nevada 89106
(702) 382-2101

1 Masons and Plasterers Vacation Savings Plan Trust and Trustees of the Cement Masons and
 2 Plasterers Joint Apprenticeship Training Trust (collectively "Trust Funds"), shall take Judgment
 3 by Confession ("Judgment") against the Defendants, Arcon Flooring, Inc. ("Arcon"), Mark M.
 4 Balogh ("Balogh"), Carl T. Postma ("Postma") and Developers Surety and Indemnity Company
 5 ("Developers") (collectively "Defendants"), in the sum of Eighteen Thousand Eight Hundred
 6 seventy-Six and 40/100 Dollars (\$18,876.40) ("Judgment Amount"), which includes known
 7 unpaid contributions for the months of October 2008 through April 2010. Defendants shall pay
 8 the Trust Funds the Judgment Amount on or before July 12, 2010.

9 2. The Judgment Amount shall be paid to the Trust Funds as third party beneficiaries
 10 of Arcon's collective bargaining agreement ("Labor Agreement") with the Operative Plasterers
 11 and Cement Masons International Association, Local No. 797 ("Union"), in which Arcon agreed
 12 to abide by the trust agreements establishing the respective Trust Funds and any amendments
 13 thereto ("Trust Agreements").

14 3. Upon the Trust Funds' timely receipt and negotiation of the Judgment Amount, (i)
 15 liquidated damages in the sum of Two Hundred Ninety-Seven Thousand One Hundred Fifty-Six
 16 and 93/100 Dollars (\$297,156.93) shall be waived ("Liquidated Damages Waiver") and (ii) the
 17 Trust Funds' claims against Defendant Developers shall be dismissed without prejudice. In the
 18 event Defendants fail to remit the Judgment Amount on or before July 12, 2010, the Liquidated
 19 Damages Waiver shall be deemed revoked, Defendants shall be obligated to pay all such
 20 Liquidated Damages to the Trust Funds, and the Judgment Amount shall be immediately
 21 increased by the amount of the Liquidated Damages Waiver, except that Defendant Developers
 22 shall be liable only to the extent of the bond.

23 4. During such periods as Arcon may be signatory to a Labor Agreement with the
 24 Union, Arcon shall remain current and submit timely monthly reports and payments of
 25 contributions to the Trust Funds ("Permanent Injunction"). Arcon shall remit accurate reports and
 26 contribution payments to the Trust Funds for the period beginning with the month of May 2010
 27 (due on or before June 30, 2010), through the effective period of the Labor Agreement. In the
 28 event Arcon shall fail to abide by the terms of this Permanent Injunction, the Trust Funds may

BROWNSTEIN HYATT FARBER SCHRECK
 100 City Parkway, Suite 1600
 Las Vegas, Nevada 89106
 (702) 382-2101

1 immediately seek to recover any amounts due as provided in paragraph 6 hereafter and
2 Defendants Balogh and Postma (collectively the "Fiduciary Defendants"), as ERISA fiduciaries,
3 shall be jointly and severally liable, together with Arcon, for any and all delinquent contributions
4 and resulting ancillary costs that may be due.

5 5. All payments required by this Judgment, the Labor Agreement or related claims
6 shall be credited first to ancillary costs and charges, including interest, liquidated damages (except
7 with respect to the Liquidated Damages Waiver as set forth above), audit costs, attorney's fees
8 and court costs, and lastly to principal contributions, without regard to the Trust Funds' discretion
9 to fund employee benefits in whole or in part with such payments. The payments shall be made
10 payable to the "Cement Masons Joint Trust Funds" and shall be remitted to the Trust Funds' at
11 the address or location designated on the Trust Funds' monthly remittance report forms, or at such
12 other location as Defendants are notified in writing.

13 6. Should Defendants fail to satisfy any of the conditions in this Judgment and
14 Permanent Injunction, written notice of default ("Notice") shall immediately be delivered to
15 Defendants c/o Andrew D. Smith, Ellsworth Moody & Bennion, Chtd., 7881 West Charleston
16 Boulevard, Suite 210, Las Vegas, Nevada 89117, or at such other location as Plaintiffs are
17 notified in writing. If Defendants thereafter fail to make the required payment(s) or otherwise fail
18 to comply with the conditions of this Judgment within five (5) business days of the date of such
19 Notice, the Trust Funds shall have the unconditional and immediate right to execute on this
20 Judgment and Stipulated Injunction for whatever amount then remains due and owing, without
21 further notice to Defendants or Order from the Court. In the event of default and failure to cure,
22 the Judgment Amount shall be immediately increased by any additional claims accrued and owed
23 by Defendants to the Trust Funds pursuant to this Judgment (except with respect to the Liquidated
24 Damages Waiver as set forth in paragraph 3 above provided that the Judgment Amount is timely
25 paid as set forth in paragraph 1 above) and the new Judgment Amount shall continue to accrue
26 interest at a rate of fourteen percent (14%) until paid in full. In the event the Trust Funds should
27 discover additional claims pursuant to an audit or Arcon should fail to timely submit reports and
28 payments of contributions to the Trust Funds as provided in the Labor Agreement and Paragraph

BROWNSTEIN HYATT FARBER SCHRECK
100 City Parkway, Suite 1600
Las Vegas, Nevada 89106
(702) 382-2101

1 4 above, the amount of such claims may be added to this Judgment. The amount of such
2 additional obligations may be established by affidavit of the Trust Funds' administrator or other
3 representative.

4 7. Should the Trust Funds determine that their statutory collection remedies related to
5 their claims under this Judgment and Permanent Injunction may be lost or materially
6 compromised without pursuing formal claims, including lien claims pursuant to NRS 108, general
7 (original) contractor claims pursuant to NRS 608.150, bond claims, etc., the Trust Funds may take
8 reasonable steps and employ customary legal procedures to preserve and pursue any such
9 remedies and claims. During the period of this Permanent Injunction and in order to assist Arcon
10 in timely complying with its obligations under this Judgment and Permanent Injunction, the Trust
11 Funds agree to take any reasonable steps necessary to assist Arcon in collecting payments from
12 Arcon's general contractors, including entering into joint check arrangements with Arcon's
13 general contractors and issuing status letters to Arcon's general contractors upon timely receipt of
14 payments from Arcon; however, nothing in this provision shall waive or excuse Arcon's
15 obligation to make timely payments as provided in paragraphs 1 and 4 of this agreement.

16 8. Nothing in this Judgment shall, or shall be deemed to, in any manner limit, waive
17 or release the obligations under the Labor Agreement of Arcon and any trades or businesses under
18 common control with Arcon, if any.

19 9. No waiver of any breach by Defendants of this Judgment nor acceptance of a late
20 payment or waiver of a timely payment by the Trust Funds shall constitute a waiver of any other
21 breach or timely payment or the right of the Trust Funds to accelerate the entire amount due or the
22 right of the Trust Funds to record, enter and execute upon the Stipulation and this Judgment.

23 10. The following potential claims are expressly reserved by the Trust Funds: (i) any
24 Trust Fund claims unrelated to the Judgment amount, accruing before or after the effective date of
25 this Judgment, including, without limitation, claims by the Trust Funds for additional
26 contributions and related damages that may be (or become) due and owing to the Trust Funds
27 pursuant to the provisions of any collective bargaining agreement to which Arcon may be bound
28 that requires the payment of contributions to the Trust Funds, other than the Labor Agreement

BROWNSTEIN HYATT FARBER SCHRECK
100 City Parkway, Suite 1600
Las Vegas, Nevada 89106
(702) 382-2101

1 between Arcon and the Union; (ii) the obligation of Arcon or any trade or business under
2 common control of Arcon (to the extent Arcon or any trade or business under common control
3 with Arcon has any obligation) to pay, and the rights of the pension funds to assess and collect,
4 withdrawal liability pursuant to 29 U.S.C. §1381 et seq. (including use of Arcon's contribution
5 history for purposes of calculating any withdrawal liability); (iii) any additional claims discovered
6 by compliance Audit for any past, present or future Audit period; (iv) any claims for untimely
7 paid contributions arising after April 2010; and (v) any general contractor claims pursuant to NRS
8 608.150, lien claims pursuant to NRS 108, pay and performance bond claims, licensing bond
9 claims and any other ERISA or state law claim enforceable by the Trust Funds.

10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 11. In the event of the filing of any bankruptcy petition by Defendants, any payments
made by Defendants pursuant to the terms of this Judgment shall be deemed to have been made
for new value as provided under 11 U.S.C. § 547(c)(1) and in the ordinary course of Defendants'
business as provided under 11 U.S.C. § 547(c)(2), so that such payments shall not be claimed by
Defendants as preference under 11 U.S.C. § 547 or otherwise.

12. Defendants have consulted an attorney of their choice and fully understand the
obligations and consequences of this Judgment.

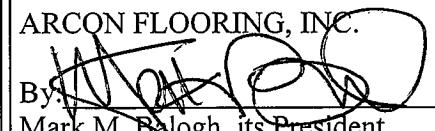
13 Dated and Done this 14th day of July, 2010.



14 U.S. DISTRICT COURT JUDGE

15 Approved as to Form and Content:

16 ARCON FLOORING, INC.

17 By: 
18 Mark M. Balogh, its President

19 Dated: July 13, 2010.

20 MARK M. BALOGH

21 By: 
22 Carl T. Postma

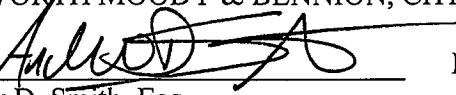
23 Dated: July 13, 2010.

24 CARL T. POSTMA

25 By: 
26 Carl T. Postma

27 Dated: July 13, 2010.

1
2 ELLSWORTH MOODY & BENNION, CHTD.
3

4 By: 
5 Andrew D. Smith, Esq.
6 Attorneys for Defendants

7 Approved and Submitted by:
8

9 Brownstein Hyatt Farber Schreck, LLP
10

11 By: /s/ Xanna Hardman
12 Xanna R. Hardman, Esq.
13 Attorneys for the Trust Funds
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BROWNSTEIN HYATT FARBER SCHRECK
100 City Parkway, Suite 1600
Las Vegas, Nevada 89106
(702) 382-2101

1 OATH AND VERIFICATION

2 STATE OF NEVADA)
3 COUNTY OF CLARK) : ss.

4 Mark M. Balogh, being first duly sworn upon oath, now verifies and declares that:

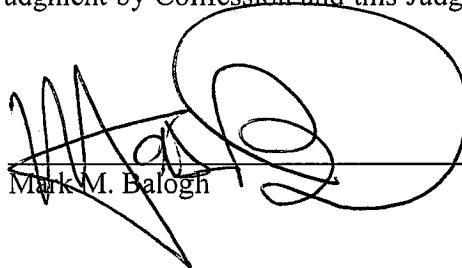
5 1. Entry of this Judgment by Confession, according to its provisions, is duly
6 authorized; and

7 2. The money due and owing and the basis for said Judgment by Confession are
8 accurately set forth in the Stipulation for Entry of Judgment by Confession and this Judgment by
9 Confession.

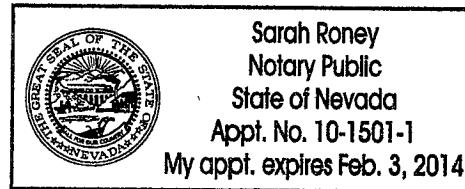
10 Further you affiant sayeth naught.

11
12 Subscribed and Sworn before me
13 this 13 day of July, 2010.

14 
15 Notary Public



Mark M. Balogh



BROWNSTEIN HYATT FARBER SCHRECK
100 City Parkway, Suite 1600
Las Vegas, Nevada 89106
(702) 362-2101

OATH AND VERIFICATION

STATE OF NEVADA)
| : ss.
COUNTY OF CLARK)

Carl T. Postma, being first duly sworn upon oath, now verifies and declares that:

1. Entry of this Judgment by Confession, according to its provisions, is duly authorized; and

2. The money due and owing and the basis for said Judgment by Confession are accurately set forth in the Stipulation for Entry of Judgment by Confession and this Judgment by Confession.

Further you affiant sayeth naught.

Carl T. Postma

Subscribed and Sworn before me
this 13 day of July, 2010.

Notary Public

